

**Letter of Findings: 43-20110449
Underground Storage Tank Fees
For the Years 1994 through 2009**

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ISSUE

I. Underground Storage Tank Environmental Fees – Imposition.

Authority: IC § 6-8.1-1-1; IC § 6-8.1-5-1(c); IC § 6-8.1-5-2(a); IC § 6-8.1-5-2(f); IC § 6-8.1-9-1(a); IC § 13-23-12-1; IC § 13-23-12-1(c); IC § 13-23-12-4; Underground Storage Tank Notification, Reporting, and Closure Requirements (last visited Nov. 26, 2011) <http://www.in.gov/idem/files/la-50-gg.pdf>.

Taxpayer states that the supplemental assessment of additional underground storage tank fees is unwarranted.

STATEMENT OF FACTS

Taxpayer operates a marina. The marina sells gasoline to its patrons. The gasoline is contained in an underground storage tank.

Taxpayer acquired the marina from the former owner in 1994. Taxpayer duly provided the Indiana Department of Environmental Management ("IDEM") a document entitled "Notification of Underground Storage Tanks" that same year indicating the change of ownership.

In the belief it sold gasoline stored in a single tank, Taxpayer filed and paid an underground storage tank fee each year. For 1994 through 1998, Taxpayer paid a fee of \$290 each year. For 1999 through 2009, Taxpayer paid \$90 each year. The difference in the amount of the annual fees is irrelevant for purposes of this Letter of Findings.

In June 2010, the Department of Revenue ("Department") was given notice by the IDEM that Taxpayer did own one underground storage tank. Because Taxpayer's tank was divided into three compartments, the IDEM concluded that Taxpayer should have paid three fees each year. The Department issued proposed assessments June 23, 2010, assessing two additional fee amounts for each of the years 1994 through 2009.

Taxpayer disagreed with the assessments and submitted a protest to that effect. An administrative hearing was conducted and this Letter of Findings results.

I. Underground Storage Tank Environmental Fees – Imposition.

DISCUSSION

Taxpayer maintains that IDEM and the Department belatedly and improperly assessed the additional fees. Taxpayer states that it had been told by IDEM personnel that it was only required to remit one fee each year.

IC § 13-23-12-1 imposes a fee on underground storage tanks. Although the IDEM regulates underground storage tanks for the State, IC § 13-23-12-4 mandates that the Department of Revenue collect and deposit the underground storage tank fees.

IC § 6-8.1-1-1 defines "listed tax" to include "the underground storage tank fee ([IC 13-23](#))." The laws and regulations concerning the Department's collection of listed taxes apply to the Department's collection of the underground storage tank fees. All tax assessments – including the assessment of the storage tank fees – are presumed to be accurate and the affected taxpayer bears the burden of proving that any assessment is incorrect. IC § 6-8.1-5-1(c).

The fee on underground tanks is imposed at IC § 13-23-12-1 as follows:

(a) Each year the owner of an underground storage tank that has not been closed before July 1 of any year under:

(1) rules adopted under [IC 13-23-1-2](#); or

(2) a requirement imposed by the commissioner before the adoption of rules under [IC 13-23-1-2](#); shall pay to the department of state revenue an annual registration fee. The amount of the registration fee is found in subsection (b) of IC § 13-23-12-1 as follows:

(b) The annual registration fee required by this section is as follows:

(1) Ninety dollars (\$90) for each underground petroleum storage tank.

(2) Two hundred forty-five dollars (\$245) for each underground storage tank containing regulated substances other than petroleum.

(c) If an underground storage tank consists of a combination of tanks, a separate fee shall be paid for each tank. (Emphasis added).

The fees are assessed as follows:

[T]he fee assessment period is for July 1 of each year through June 30 of the following year. Although the assessment period begins on July 1, the Special Tax Division does not mail invoices until the fall of the year.

Underground Storage Tank Notification, Reporting, and Closure Requirements (last visited Nov. 26, 2011) <http://www.in.gov/idem/files/la-50-gg.pdf>.

Taxpayer states that it relied on the IDEM's personnel in calculating whether it should have paid one tank each year or more than one fee each year. Taxpayer calls into question the reliability of those personnel for allowing it to pay, without objection, one fee each year from 1994 through 2009. However, the Department has no information which support's Taxpayer's contention that it was deliberately or mistakenly misled by either the IDEM or the Department.

Because the fee is collected by the Department of Revenue (Department) and is a listed tax under IC § 6-8.1-1-1, the assessment of the fees is governed by IC § 6-8.1-5-2(a) which states:

Except as otherwise provided in this section, the department may not issue a proposed assessment under section 1 of this chapter more than three (3) years after the latest of the date the return is filed, or either of the following:

(1) The due date of the return.

(2) In the case of a return filed for the state gross retail or use tax, the gasoline tax, the special fuel tax, the motor carrier fuel tax, the oil inspection fee, or the petroleum severance tax, the end of the calendar year which contains the taxable period for which the return is filed.

The three-year statute of limitations applies in the absence of proof of fraud by clear and convincing evidence or a taxpayer's failure to file a return. See IC § 6-8.1-5-2(f).

Although IC § 13-23-12-1(c) plainly states that Taxpayer should have been paying the fee on three tanks, there is no "clear and convincing evidence" that Taxpayer intended to perpetrate a fraud when it reported that it owed one underground tank and that it paid one single fee each year. Therefore, the fees assessed for 1994, 1995, 1996, 1997, 1998, 1999, 2000, 2001, 2002, 2003, 2004, 2005, and 2006, are barred by the three-year statute of limitations because the fees due for 2006 were due at the end of the calendar year and because Taxpayer filed returns for each of these years. Nonetheless, because the proposed assessments were issued June 23, 2010, the Department was justified in issuing proposed assessments for 2009, 2008, and 2007. (It should be noted that if the situation were reversed – Taxpayer had for sixteen years been paying fees for three tanks when it in fact owned one – Taxpayer would be similarly barred from requesting a refund of the excess fees by the three-year statute of limitations under IC § 6-8.1-9-1(a)).

However, Taxpayer is admonished that if all the environmental fees are not paid in full, Taxpayer or any future owner will not be eligible for full payments from the Excess Liability Trust Fund (ELTF) in the event that there is a gasoline spill or other environmental problem resulting from Taxpayer's underground storage tanks.

FINDING

Taxpayer's protest is denied in part and sustained in part. The 2007, 2008, and 2009 assessments remain but the earlier thirteen assessments are time-barred.

Posted: 02/29/2012 by Legislative Services Agency
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